

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

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In the Matter of.

Request for Review by AIRNEX  
COMMUNICATIONS, INC. of Decision  
of Universal Service Administrator

Federal-State Joint Board on Universal  
Service

Changes to the Board of Directors of the  
National Exchange Carriers Association,  
Inc

CC Docket No. 96-45

CC Docket No. 97-21

**REQUEST FOR REVIEW**

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Date November 25, 2003

Attorney for Airnex Communications, Inc..

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**REQUEST FOR REVIEW**

Pursuant to 47 C.F.R. §§ 54.719-54.725 and the instructions contained in the attached letters from the Universal Service Administrative Company ("USAC"), Airnex Communications, Inc. ("Airnex") requests that the Commission review the USAC Administrator's rejection of Form 499-A revisions that Airnex submitted in order to correct misstatements of revenues reported in earlier Form 499-A filings for the three-year period from January 1, 1999 through December 31, 2001.<sup>1</sup>

**I. STATEMENT OF INTEREST AND FACTUAL BACKGROUND**

Airnex provides resold international and interstate long distance voice services pursuant to authority granted by the Commission and, therefore, is required to contribute to the Universal Service Fund ("USF").<sup>2</sup> Since the inception of Airnex's service in April 1998, Airnex has

<sup>1</sup> The USAC Administrator rejected Airnex's revised 2000 Form 499-A, 2001 Form 499-A, and 2002 Form 499-A by three separate letters, each dated November 6, 2003. Copies of these letters are attached hereto as Exhibits 1, 2, and 3, respectively.

<sup>2</sup> 47 C.F.R. § 54.706

## II. QUESTION PRESENTED FOR REVIEW

The questions presented for review are (1) whether USAC should be required to accept Airnex's revised Form 499-A filings submitted later than one year after the original submission date, and (2) whether Airnex's USF contribution liability should be re-calculated based on Airnex's revised Form 499-A filings

For the reasons stated below, Airnex respectfully submits that the Commission should answer each of these questions in the affirmative.

### A. USAC's Acceptance of Airnex's Revised Form 499-A Filings and the Re-Calculation of Airnex's USF Contribution Liability Is Required in Order to Meet the Requirements of Federal Law and the Commission's Own Rules

In *Texas Office of Public Utility Counsel v. FCC*,<sup>12</sup> the Fifth Circuit Court of Appeals rejected and remanded for further consideration the Commission's initial USF contribution policy that exempted international carriers from USF contribution requirements only if they had zero interstate revenues. The Court held that the Commission's policy was inequitable and discriminatory to the extent it resulted in carriers that specialize in providing international telephone service having to pay more in USF contributions than they recover in interstate charges.<sup>13</sup>

On remand, the Commission modified its policy in response to the Court's criticism and established a new contribution threshold for internationally-focused carriers.<sup>14</sup> Under the new rule, such carriers were required to include their international revenues in the USF contribution

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<sup>12</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999), *cert denied*, 530 U.S. 1210 (2000)

<sup>13</sup> *Id.* at pp. 433-435

<sup>14</sup> *Order on Reconsideration, supra*

base only if their interstate revenues exceeded 8% of the combined interstate and international revenue total.<sup>15</sup> Subsequently, the threshold was raised to 12%.<sup>16</sup>

As stated above, since its inception, Airnex's interstate revenues have never comprised more than 8% percent of Airnex's combined interstate and international revenues. Thus, requiring Airnex to contribute to the USF based on its prior over-statements of interstate revenues would be contrary both to the Commission's current rule and to the basic standards of fairness and nondiscrimination that led the Court of Appeals to reverse the Commission's prior policy.

Accordingly, compliance with the Commission's rule and federal law, as determined by the Court of Appeals, requires that USAC accept Airnex's Form 499-A revisions and then re-bill Airnex for USF contributions based on the corrected revenue statements.

**B. There Is No Basis for USAC's Rejection of Airnex's Form 499-A Revisions.**

The sole basis offered by USAC for rejecting the revised Form 499-A revisions submitted by Airnex was that they were "not filed within one year of the original submission[s]".<sup>17</sup> However, there is nothing in any Commission rule that either establishes such a limitation or that provides USAC with the authority to do so on its own. Indeed, the Form 499-A instructions promulgated by the Commission clearly contemplate the submission of corrected filings after one year. Although the instructions state that "[t]elecommunication providers *should* file revised Form 499-A revenue data by December 1 of the same filing year [emphasis added]," they do not preclude later filings. Instead, they simply state that "[r]evisions filed after that date must be accompanied by an explanation of the cause for the change along with

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<sup>15</sup> *Id.* at ¶19.

<sup>16</sup> 47 C.F.R. § 54.706(c) (2002).

<sup>17</sup> Exhibits 1, 2, and 3.

complete documentation showing how the revised figures derive from corporate financial records ”

Thus, the Form 499-A instructions do not limit the time within which carriers may submit revisions. To the contrary, consistent with the requirements of carriers to accurately state their revenues, the instructions merely require late filers to document the need for revisions, which Airnex has done.

Indeed, even where a USF-related filing deadline actually exists, such as in the case of revisions to Form 499-Q filings, the Commission has waived the deadline in the interests of ensuring accurate and equitable USF funding, notwithstanding the fact that the filer would have had an opportunity to subsequently correct the error in its annual Form 499-A filing and would have received a true-up credit based on the correction.<sup>18</sup> Citing statutory requirements that the mechanisms for contributions be “specific, predictable and sufficient” and that contributions to the fund “be made on an equitable and non-discriminatory basis,” the Commission determined that strict enforcement of a filing deadline would require contribution of an “erroneous amount . . . which we believe would be inconsistent with the requirement that contributions be equitable.”<sup>19</sup>

Notably, the Commission’s analysis focused on solely whether the carrier’s USF contribution would be erroneous. The carrier’s degree of culpability and the specific circumstances surrounding its failure to timely file the revised form were inconsequential against the issue of whether the amount paid would be inequitable, in violation of federal law.

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<sup>18</sup> *In re Request for Review by ABC Cellular Corporation Page Now, Inc. / ABC Paging, Inc., Federal-State Joint Board on Universal Service, changes to the Board of Directors of the National Exchange Carrier Association Order*, CC Docket No. 96-45, 97-21, DA 02-3474, 17 F.C.C. Rcd. 25192 (2002).

<sup>19</sup> *Id.* at ¶10. See, also, 47 U.S.C. § 254(d).

As explained above, USAC's USF billings to Airnex were based on grossly-inaccurate revenue reports, and would require erroneous contributions by Airnex to the USF. Indeed, if USAC's decision to reject Airnex's proffered Form 499-A revisions is allowed to stand, Airnex would be forced to pay well over 10 times more than it should. Although Airnex is at fault for making inaccurate filings, requiring it to pay an amount that is so far out of line with its properly-calculated liability would be egregiously inconsistent with the statutory requirement that USF contributions be equitable, as well as being inconsistent with any traditional notion of justice. Therefore, Airnex submits that USAC's decision to reject Airnex's revised Form 499-A filings must be reversed.

### **III. STATEMENT OF RELIEF SOUGHT**

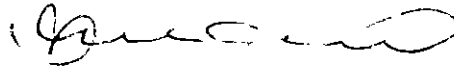
Airnex requests that the Commission reverse USAC's November 7, 2003 decision rejecting Airnex's revised Form 499-A filings, and that the Commission direct USAC to accept those filings and issue corrected USF contribution invoices to Airnex based on the information reported in these revised forms.

### **IV. CONCLUSION**

USAC had no basis or authority for rejecting Airnex's Form 499-A revisions. USAC's refusal to accept those filings and to issue corrected invoices is at odds with the underlying purposes of applicable law and Commission regulations, and, further, is grossly inconsistent with justice and equity. Therefore, Airnex requests that this Request for Review be granted and that the Commission grant Airnex the relief requested herein.

## DECLARATION

I, Shige Yamaji, President and Chief Executive Officer of Airnex Communications, Inc., do hereby declare and certify under penalty of perjury and pursuant to Section 1.16 of the Federal Communications Commission's Rules that the foregoing Request for Review is true and accurate. Executed on November 25, 2003



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Shige Yamaji

Date November 25, 2003



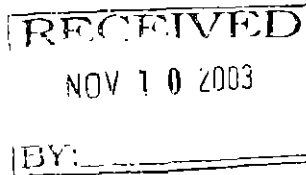




Universal Service Administrative Company

November 6, 2003

Airmex Communications, Inc.  
3000 Executive Parkway  
Suite 230  
San Ramon, CA 94583



Filer 499 ID: 818610

Attn: Shige Yamaji

RE: 2000 Form 499-A Revision Rejection

The Universal Service Administrative Company (USAC) has completed a review of the Revised FCC Form 499-A that you submitted for the purpose of revising revenue reported by Airmex Communications, Inc. for the period January 1 – December 31, 1999. Based on the information provided, we are unable to accept the revision because it was not filed within one year of the original submission.

USAC recognizes that you may disagree with our decision. **If you wish to file an appeal, your appeal must be received no later than 30 days after the date of this letter.**

In the event that you choose to appeal the decision, you should follow these guidelines:

- Write a "Letter of Appeal to USAC" explaining why you disagree with this Revised Form 499-A Rejection letter and identify the outcome that you request;
- Mail your letter to:  
Letter of Appeal  
USAC  
2120 L Street, NW, Suite 600  
Washington, DC 20037
- Appeals submitted by fax, telephone call, and e-mail **will not** be processed.
- Provide necessary contact information. Please list the name, address, telephone number, fax number, and e-mail address (if available) of the person who can most readily discuss this appeal with USAC.
- Identify the "Legal Reporting Name" and "Filer 499 ID "

- Explain the appeal to the USAC. Please provide documentation to support your appeal
- Attach a photocopy of this Revised Form 499-A Rejection decision that you are appealing.

USAC will review all "letters of appeal" and respond in writing within 90 days of receipt thereof

The response will indicate whether USAC:

- (1) agrees with your letter of appeal, and approves an outcome that is different from the Revised Form 499-A Rejection Letter; or
- (2) disagrees with your letter of appeal, and the reasons therefor.

If you disagree with the USAC response to your "letter of appeal," you may file an appeal with the FCC within 30 days of the date USAC issued its decision in response to your "Letter of Appeal." The FCC address where you may direct your appeal is:

Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Room TW-A325  
Washington, DC 20554

Please be sure to indicate the following information on all communications with the FCC:  
"Docket Nos 96-45 and 97-21."

**In the alternative**, you may write and send an appeal letter directly to the Federal Communications Commission (FCC), and bypass USAC. Your letter of appeal to the FCC must explain why you disagree with the USAC decision. You are also encouraged to submit any documentation that supports your appeal. The FCC rules governing the appeals process (Part 54 of Title 47 of the Code of Federal Regulations 54.719 – 54.725) are available on the FCC web site ([www.fcc.gov](http://www.fcc.gov))

If you have questions or concerns regarding this letter, please contact Lisa Tubbs at (973) 884-8116 or Christy Doleshal at (973) 560-4428.

Sincerely,

**USAC**



RECYCLED PAPER MADE FROM 30% POST CONSUMER CONTENT



Universal Service Administrative Company

November 6, 2003

Airmex Communications, Inc  
3000 Executive Parkway  
Suite 230  
San Ramon, CA 94583

RECEIVED

NOV 10 2003

BY:

Filer 499 ID: 818610

Attn: Shige Yamaji

RE: 2001 Form 499-A Revision Rejection

The Universal Service Administrative Company (USAC) has completed a review of the Revised FCC Form 499-A that you submitted for the purpose of revising revenue reported by Airmex Communications, Inc. for the period January 1 – December 31, 2000. Based on the information provided, we are unable to accept the revision because it was not filed within one year of the original submission.

USAC recognizes that you may disagree with our decision. **If you wish to file an appeal, your appeal must be received no later than 30 days after the date of this letter.**

In the event that you choose to appeal the decision, you should follow these guidelines:

- Write a "Letter of Appeal to USAC" explaining why you disagree with this Revised Form 499-A Rejection letter and identify the outcome that you request;
- Mail your letter to:  
Letter of Appeal  
USAC  
2120 L Street, NW, Suite 600  
Washington, DC 20037
- Appeals submitted by fax, telephone call, and e-mail **will not** be processed.
- Provide necessary contact information. Please list the name, address, telephone number, fax number, and e-mail address (if available) of the person who can most readily discuss this appeal with USAC.
- Identify the "Legal Reporting Name" and "Filer 499 ID."

- Explain the appeal to the USAC. Please provide documentation to support your appeal
- Attach a photocopy of this Revised Form 499-A Rejection decision that you are appealing

USAC will review all "letters of appeal" and respond in writing within 90 days of receipt thereof.

The response will indicate whether USAC:

- (1) agrees with your letter of appeal, and approves an outcome that is different from the Revised Form 499-A Rejection Letter, or
- (2) disagrees with your letter of appeal, and the reasons therefor.

If you disagree with the USAC response to your "letter of appeal," you may file an appeal with the FCC within 30 days of the date USAC issued its decision in response to your "Letter of Appeal." The FCC address where you may direct your appeal is:

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Sincerely,

*USAC*



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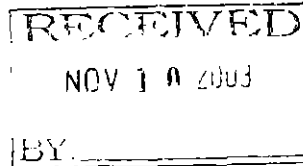
EXHIBIT 3



Universal Service Administrative Company

November 6, 2003

Airmex Communications, Inc.  
3000 Executive Parkway  
Suite 230  
San Ramon, CA 94583



Filer 499 ID: 818610

Attn: Shige Yamaji

RE 2002 Form 499-A Revision Rejection

The Universal Service Administrative Company (USAC) has completed a review of the Revised FCC Form 499-A that you submitted for the purpose of revising revenue reported by Airmex Communications, Inc. for the period January 1 – December 31, 2001. Based on the information provided, we are unable to accept the revision because it was not filed within one year of the original submission.

USAC recognizes that you may disagree with our decision. **If you wish to file an appeal, your appeal must be received no later than 30 days after the date of this letter.**

In the event that you choose to appeal the decision, you should follow these guidelines:

- Write a "Letter of Appeal to USAC" explaining why you disagree with this Revised Form 499-A Rejection letter and identify the outcome that you request;
- Mail your letter to:  
Letter of Appeal  
USAC  
2120 L Street, NW, Suite 600  
Washington, DC 20037
- Appeals submitted by fax, telephone call, and e-mail **will not** be processed.
- Provide necessary contact information. Please list the name, address, telephone number, fax number, and e-mail address (if available) of the person who can most readily discuss this appeal with USAC
- Identify the "Legal Reporting Name" and "Filer 499 ID "

- Explain the appeal to the USAC. Please provide documentation to support your appeal
- Attach a photocopy of this Revised Form 499-A Rejection decision that you are appealing.

USAC will review all "letters of appeal" and respond in writing within 90 days of receipt thereof.

The response will indicate whether USAC:

- (1) agrees with your letter of appeal, and approves an outcome that is different from the Revised Form 499-A Rejection Letter; or
- (2) disagrees with your letter of appeal, and the reasons therefor.

If you disagree with the USAC response to your "letter of appeal," you may file an appeal with the FCC within 30 days of the date USAC issued its decision in response to your "Letter of Appeal." The FCC address where you may direct your appeal is:

Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Room TW-A325  
Washington, DC 20554

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"Docket Nos. 96-45 and 97-21."

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If you have questions or concerns regarding this letter, please contact Lisa Tubbs at (973) 884-8116 or Christy Doleshal at (973) 560-4428.

Sincerely,

*USAC*





## DECLARATION OF SHIGE YAMAJI

I, Shige Yamaji, declare

1 I am the President and CEO of Airnex Communications (“Airnex”).

2 Since the inception of Airnex’s service in April 1998, the company has focused  
primarily on the provision of international long distance voice service, and at no time  
since the company’s inception have Airnex’s interstate revenues exceeded 8% of its  
combined interstate and international revenue totals in any year

3 Airnex relied on a third-party vendor, Telecom Compliance Services (“TCS”),  
whose address is 1720 Windward Concourse, Suite 250, Alpharetta, Georgia 30005, to  
prepare these filings

4 Although I signed the certification block on each of the Form 499-A filings, I  
relied on TCS to ensure that the filings were completely properly and did not  
independently review them before returning them to TCS for submission to the Universal  
Service Administrative Company (“USAC”).

5 I now know that Airnex’s original Form 499-A filings submitted in 2000, 2001,  
and 2002 failed to properly distinguish between Airnex’s interstate and international  
revenues and, instead, incorrectly reported that all of Airnex’s telecommunications  
revenues were interstate, which resulted in Airnex’s being billed for Universal Service  
Fund (“USF”) contributions that were far in excess of what it should have been billed for.

6 After Airnex received huge, unexpected bills for Universal Service Fund  
contributions based on the incorrect Form 499-A filings, I directed various management  
personnel to follow up with USAC and attempt to determine both the cause of billings

and to work out any necessary payment arrangements. However, due to distractions caused by pressures of responding to competition and various financial challenges, this job was never completed. Consequently, Airnex continued to rely on TCS to prepare its filings and I continued to certify the filings as accurate without engaging in any independent review until the spring of this year.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed as of the date shown below.

Dated: November 25, 2003

A handwritten signature in black ink, appearing to read 'Shige Yamaji', written over a horizontal line.

Shige Yamaji

